No. 82-940

Office-Supreme Court, U.S.
FILED
MAY 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPAULDING, A Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
CHARLES S. RALSTON
GAIL J. WRIGHT*
Suite 2030
10 Columbus Circle
New York, New York 10019
[212] 586-8397

ELIZABETH BARTHOLET
Harvard Law School
Cambridge, Massachusetts
[617] 495-3128

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

*Counsel of Record

Dated: May 9, 1983

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of Interest of Amicus Curiae	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. IN ENACTING TITLE VII, CONGRESS WAS AWARE OF THE INTENTIONAL DISCRIMINATION WITHIN LAW PARTNERSHIPS AND ITS ROLE IN PERPETUATING PAST RACIAL INJUSTICE ..	6
A. Prior to 1964 Overt Racial Discrimination Was Prevalent Throughout the Institutions Which Trained, Regulated, and Employed Lawyers	7
B. Congress Chose Not to Create An Exemption to Protect the Discriminatory Practices of Law Partnerships	26
II. RACIAL DISCRIMINATION WITHIN LAW PARTNERSHIPS REMAINS A SIGNIFICANT BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY	31
A. The Racially Premised Decision Making That Persists in Most Law Partnerships Is Precisely the Type of Barrier Title VII Was Intended to Eliminate	31

Page

B. As A Result of Continued Racial Discrimination, Blacks Remain Dramatically Under-represented in the Legal Profession and in Law Partnerships 41

C. A Failure to Permit Title VII Scrutiny of Partnership Promotion Decisions Will Have Far-Reaching Effects and Inhibit Integration of the Entire Legal Profession .. 48

CONCLUSION 55

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:	Page
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).....	9,27
Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982)	37
Andrus v. Glover Construction Co., 446 U.S. 608 (1980).....	29
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)	10
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)	13
City of Los Angeles Department of Water v. Manhart, 435 U.S. 702 (1978).....	36
Connecticut v. Teal, ___ U.S. ___, 50 U.S.L.W. 4716 (June 4, 1982)	36
County of Washington V. Gunther, 452 U.S. 161 (1981)	29
Davis v. Califano, 6131 F.2d 957 (D.C. Cir. 1979).....	38
Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979).....	41
Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971)	33,34

Cases: Page

Dickerson v. U.S. Steel Corp., 15 Fair Empl. Prac. 752 (E.D. Pa. 1977)..... 35

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 35

Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974)..... 40

Fisher v. Hurst, C.I., 333 U.S. 147 (1948)..... 14

Franks v. Bowman Transport Co., 424 U.S. 747 (1976)..... 55

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 28

In Re Charles Taylor, 48 Md. 2B (1877)..... 10,11

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)..... 26,28,36

Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980)..... 40

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 49

Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973) appeal dismissed, 496 F.2d 1094 (2d Cir. 1974)..... 37

Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) 41

Louisiana v. United States, 380 U.S. 145 (1965)..... 27

Cases: Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)..... 26

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)..... 14

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)..... 13

Powell v. Syracuse University, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978)..... 40

Scheur v. Rhodes, 416 U.S. 232 (1974)..... 31

Sipnel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948)..... 14

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 10

Sweatt v. Painter, 339 U.S. 629 (1950)..... 14

Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated and remanded on other grounds, 459 U.S. 24 (1978)..... 40

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971)..... 35

University of Maryland v. Murray, 169 Md. 478, 182 A.2d 590 (1936)..... 13

Cases — Page

U.S. ex rel: Robinson v. Bar Association of the District of Columbia, 197 F.2d 408 (D.C. Cir. 1952) 18

U.S. Postal Service v. Aikens, ___ U.S. __, 51 U.S.L.W. 4354 April 5, 1983 39

Statutes and Regulations:

29 C.F.R. §1604.2..... 34

Md. Act of 1876, ch. 264, §3..... 10

Statutes and Regulations:

Md. Act of 1872, ch. 91, §3..... 10

Md. Code 1860, Art 11, §30..... 10

42 U.S.C. §2000(a) et. seq. 30

42 U.S.C. § 2000e et. seq. 30

42 U.S.C. § 2000-2(i) 30

42 U.S.C. §3603(b) et. seq. 30

42 U.S.C. §3607..... 30

Legislative History:

110 Cong. Rec. 13088 (1964) 30,36

118 Cong. Rec. 3802 (1972) 30,36

H. Rep. No. 238, 92 Cong., 1st Sess. (1971) 54

S. Rep. No. 415, 92 Cong., 1st Sess. (1971) 54

Rules: Page

F.R. Civ. P. 12 (b)(i) 31

Other Authorities:

A.A.L.S. Proceedings, 1964, Part One: Reports of Committees 159 14

A.A.L.S. Proceedings, 1963, Part Two 100 24,25

37 A.B.A. Reports, 1912..... 16,17

J. Auerbach, Unequal Justice (1976)..... 16,17,19

Baker, Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement, 18 How. L. J. 685 (1975)..... ... 8,21

Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982) 37,54

Blacks Moving Into Key Legal Posts, Washington Post, April 11, 1976, at A-1..... 17

M. Bloomfield, American Lawyers in a Changing Society, 1776-1876 (1976)..... 12

Brown, Racial Discrimination in the Legal Profession, 53 Judicature 385 (1970)..... 52

Other Authorities: Page

Carl and Callahan, Negroes and the Law, 17 J. of Legal Ed. 250 (1964-65)..... 52

Civil Rights, Report of United States Commission on Civil Rights (1963) 14,15,19

Clark and Clark, The Black Lawyer -- A New Day, But Slow in Dawning, in Minority Opportunities for Blacks, Puerto Ricans and Chicanos, 256 (C.P. Clark ed. 1974)..... 22

J. Comer, Beyond Black and White, (1972) 7

B. Curran, Career Patterns of Minority Lawyers (paper presented at ABA midyear meetings, Feb. 5, 1983)..... 29

B. Curran, Lawyer Demographics (paper presented at ABA Annual Meeting, Aug. 8, 1981)..... 42,50

Edwards, A New Role for the Black Law Graduate -- A Reality or an Illusion?, 69 Mich. L. Rev. 1407 (1971)..... 34,44,50

Edwards, "Headwinds" Minority Placement in the Legal Profession, 16 L. Quadrangle Notes.(U. of Mich. L.S. Spring (1972))..... 44

G. Franklin Edwards, The Negro Professional Class (1959)..... 21

Gellhorn, The Law Schools and the Negro, 1968 Duke L.J. 1069..... 8,13,20,50

Other Authorities: Page

M. Goldman, A Portrait of the Black Attorney in Chicago (1972).. 9,18,20,21,26 32,33,35,52

A.L. Higginbotham, Jr., Racism and the Early American Legal Process, 1619-1896, 407 Annals, 1, 17 (May 1973) 9

B. Kroger, The Negro Lawyer in Maryland (1948)..... 10,11

LeFlar, Legal Education: Desegregation in Law Schools, 43 A.B.A.J. 145 (1957)..... 14

W. Leonard, Black Lawyers (1977) 12,14,20,23

W. Leonard, The Development of the Black Bar, 407 Annals 134 (May 1973) 11

Minority Attorneys Struggle to Land that First Job, Legal Times, Feb. 7, 1983, at 32..... 48,49

G. Myrdal, An American Dilemma (1944)..... 7,25,53

National Law Journal, Dec. 20, 1982, at 1..... 47

National Law Journal, April 20, 1981, at 1..... 33

Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Amer. Bar Fnd. Research 97..... 52

Other Authorities: Page

Ortique, The National Bar Association -- Not Just an Option, 53 Judicature 390 (1970)..... 15,17

Paone and Reis, Effective Enforcement of Federal Non-Discrimination Provisions in the Hiring of Lawyers, 40 U.S. Cal. L. Rev. 615 (1967)..... 8

B. Schlei and P. Grossman, Employment Discrimination Law 1976).... 49

G. Segal, Blacks in the Law (1983)..... 8,13,15,16,17, 18,22,43,44, 45,46

Shuman, A Black Lawyer Study, 16 How. L.J. 225 (1971)..... 21,33,34

C. Silberman, Crisis in Black and White (1964)..... 25

E. Smigel, The Wall Street Lawyer (1964)..... 22,33,34,52

Statistical Abstract of the United States (1969) 20

The Firms -- What Do They Want, Harvard Law Record, Dec. 12, 1963 at 1..... 23,24,33

U.S. Bureau of the Census, 1960 Census..... 20

Westcott, Blacks in the 1970s: Did They Scale the Job Ladder, 105 Bureau of Labor Statistics Monthly Labor Review 32 (June 1982)..... 42

C.G. Woodson, The Negro Professional Man and the Community (1934) 7

NO. 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

==========

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPAULDING,
A Partnership,

Respondent.

==========

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

==========

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

==========

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation, which was established for the purpose of

---

1/ Consent has been granted by both the petitioner and the respondent for the filing of this amicus curiae brief.

assisting Black citizens in securing their consitutional civil rights. Its attorneys have represented parties and participated as amicus curiae in numerous cases before this Court involving various facets of the law.

Amicus interest in the outcome of this case is twofold. First, the Legal Defense Fund is acutely aware of the gross underrepresentation of Blacks in the legal arena, resulting from historical and persistent patterns and acts of racial discrimination. Amicus recognizes the need for Black attorneys to participate fully in all aspects of the legal community. For example, we recognize that due to their race, Blacks have been excluded from practicing in the nation's law firms, the bastions of the legal world.

The Legal Defense Fund has appeared before this Court as amicus curiae in cases addressing the need to protect and guarantee the civil rights of Blacks engaged in the legal profession. E.g. De Funis v.

Odegard, 416 U.S. 312 (1974); NAACP v. Button, 371 U.S. 415 (1963).

Amicus second interest is that this case may have far-reaching implications on the scope of Title VII in other litigation involving professionals and professional institutions. An affirmance would sound a death knell to Black lawyers seeking entry into or advancement within law firms, by notifying employers who discriminate that they were immune to the scrutiny of Title VII. Such a conclusion could have severe negative ramifications not only on the legal profession, but in other professional institutions as well.

SUMMARY OF ARGUMENT

This case raises a single narrow issue: whether a federal court is totally without power under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., to take jurisdiction of an employee's claim that she or he was denied promotion to a

partnership position with a law firm and consequently discharged by the employer solely on the basis of race, color, religion, sex or national origin. The resolution of this issue turns primarily on the construction and application of several statutory terms found in Title VII. Fully supporting the statutory interpretation set forth in Petitioner's brief, the arguments here focus on the special significance of this case to blacks.

Historically, the legal profession has been one of the most racially segregated occupational groups in American society. During the century preceeding the passage of the Civil Rights Act of 1964, minorities were excluded from the legal profession or relegated to a second-class professional status as a result of overt racial discrimination on the part of educational and professional institutions, including employment discrimination by large law firms. This history of institutionalized discri-

mination was well recognized at the time Title VII was enacted and was precisely the type of racial injustice that the Civil Rights Act of 1964 was intended to remedy. In the absence of any express statutory exemption, Title VII should not be read to immunize any segment of the legal profession from Congress' mandate of equal opportunity in the work force.

Since 1964 a decline in the openly racist practices of legal institutions has facilitated some increase in the number of black lawyers. Nonetheless, many law firms continue to discriminate in the hiring and promotion of minority lawyers, frequently relying on racially premised assumptions regarding the ability of minorities to "fit in" with non-minority clients and co-workers. Such discrimination has denied black laywers access to the most important and lucrative areas of practice and has contributed to a perpetuation of the historic under-representation of blacks in the

legal profession. The creation of a special partnership exception to Title VII coverage will not only encourage a perpetuation of this covert segregation, but will authorize law partnerships to once again engage in the deliberate overt discrimination that flourished prior to 1964. Unless Title VII is read to provide law firm associates with some assurance that they will not be denied partnership and discharged because of their race, blacks will be understandably reluctant to seek employment with firms and will be generally discouraged from entering the legal profession. The terms of Title VII should not be construed in a manner which undermines the purpose of the Act to protect individuals from discriminatory treatment and eliminate racially stratified job environments.

ARGUMENT

I

IN ENACTING TITLE VII, CONGRESS WAS AWARE OF THE INTENTIONAL DISCRIMINATION WITHIN LAW PARTNERSHIPS AND ITS ROLE IN PERPETUATING PAST RACIAL INJUSTICE

A. Prior to 1964 Overt Racial Discrimination Was Prevalent Throughout the Institutions Which Trained, Regulated, and Employed Lawyers.

In some respects, the historical lack of black lawyers can be attributed to the general discriminatory attitude common throughout American society. During the century before the Civil Rights Act of 1964 a socialized acceptance of black inferiority by judges, jurors, clients stood as a constant barrier to the successful practice of the law by blacks.[1/] However, a more direct and in many respects more powerful set of racial barriers was purposefully erected by the institutions that controlled access to legal practice.

In 1963, Secretary of Labor Willard Wirtz labeled the legal profession "the worst segregated group in the whole economy

---

1/ See e.g., G. Myrdall, An American Dilemma, 325-26, 550,325-26, 550, 801-02 (1944); C.G. Woodson, The Negro Professional Man and the Community, 184-239 (1934); J. Comer, Beyond Black and White 11 (1972).

or society."[2/] This segregation was the result of a succession of overt racial barriers erected by the institutions that controlled access to legal practice. Through policies set first by legislatures and courts, and then by law schools, bar associations and large law firms, blacks were excluded from practicing law and forced to the "fringe of the profession."[3/]

A similar conclusion drawn by an American Bar Foundation study was that "the latent racism which has accumulated in all major American social institutions also

---

2/ Reported in G. Segal, Blacks in the Law, 24 (1983); Paone and Reis, Effective Enforcement of Federal Non-Discrimination Provision in the Hiring of Lawyers, 40 U.S. Cal. L. Rev. 615, 616 (1967).

3/ Gellhorn, The Law Schools and the Negro, 1968 Duke L.J. 1069, 1070; Baker, Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement, 18 How. L.J. 685, 692 (1975) ("The major reason for the lack of Black lawyers today is traceable to both state enforced and institutionalized racial discrimination.").

pervades the legal profession." 4/ In determining the applicability of Title VII to this case and attempting to promote the legislative objective "to eliminate so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), the discriminatory history of the profession and the role of law partnerships in that history cannot be ignored. It is thus "appropriate ... to look down the corridor of history and rcognize that so many for so long failed to deal with the racial injustices around them." A.L. Higginbotham, Jr., Racism and the Early American Legal Process, 1619-1896, 407 Annals, 1, 17 (May 1973).

The earliest racial restrictions on the practice of law were imposed in state courts and legislatures. These state imposed racial restrictions continued even after the

---

4/ M. Goldman, A Portrait of the Black Attorney in Chicago, 49 (1972).

ratification of the Civil War Amendments. In Maryland, for example, a law requiring an applicant for the state bar to be a "free white male citizen" was re-enacted in 1872 and 1876.[5/] This Act was construed to prohibit all blacks from practicing law in Maryland, even those who had previously been admitted to the bar of another state. In Re Charles Taylor, 48 Md. 28 (1877). The Maryland Court of Appeals relied on the decisions of this Court in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), to affirm the constitutionality of the state law. 48 Md. at 30-32. This absolute exclusion of blacks from the legal profession in Maryland

---

5/ See Md. Code 1860, Art. 11, 30; repealed and reenacted without change to relevant portions by Act of 1872, Ch. 91 3 and Act of 1876, Ch. 264, §3. No other profession was restricted by law in post-Civil War Maryland. See B. Kroger, The Negro Lawyer in Maryland 3 (1948).

continued until 1885.[6/]

State enforced restrictions, along with the general racial animosity of which those restrictions were both a symptom and a cause, limited black lawyers in the nineteenth century to a scattered handful.[7/] Although there were some bright spots signaling the emergence of a black bar during the Reconstruction period -- including the graduation of George Ruffin from Harvard Law School and the opening of Howard University Law School, both in 1869 -- these prospects were too few to provide any meaningful employment opportunities to blacks as a whole. The few blacks who were able to penetrate the legal profession's ivory tower

---

6/ B. Kroger, supra note 5, at 3 (discussing unpublished opinion of the Supreme Bench of Baltimore City which "virtually overruled the Maryland Court of Appeals decision in In Re Charles Taylor, supra).

7/ See generally W. Leonard, The Development of the Black Bar, 407 Annals 134 (May 1973). Tollett, Black Lawyers, Their Education, and the Black Community, 17 How. L.J. 326 (1971).

were those, like John Mercer Langston, who combined an extraordinary amount of talent and determination with a degree of good fortune that was rarely bestowed upon blacks of this period.[8/] Even in the absence of legislation, state courts in the nineteenth century frequently refused to accredit black lawyers.[9/]

As state laws directly barring blacks access to the legal profession were challenged and forced to collapse, states began to require that bar applicants have law degrees. Many states and private law schools, however, continued to refuse to admit blacks during the first half of the twentieth century and hence the difficulty

---

8/ Id.

9/ See, e.g., M. Bloomfield, American Lawyers in a Changing Society, 1776-1876, 312-315 (1976)(Ohio court admitted John Mercer Langston to bar in 1854 only after a visual examination of applicant convinced the court that he possessed more white than Negro blood); see generally W. Leonard, Black Lawyers (1977).

in obtaining legal education became the "fundamental discouragement" excluding blacks from the practice of law. G. Segal, supra note 2, at 1; see also Gellhorn, supra note 3, at 1069 (Northern law schools were only "nominally open" to blacks, and most Southern law schools were "completely closed to the Negro until the 1950's.")

Discrimination in law schools originally took the form of state laws and official policies that absolutely prohibited black enrollment in "white" institutions. These formal racial standards were challenged and invalidated one by one during the two decades leading up to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).[10/]

10/ University of Maryland v. Murray, 169 Md. 478, 182 A.2d 590 (1936) (ordering state law schools to admit black applicant, but leaving open possibility that state might satisfy its constitutional obligations by providing blacks with grants to attend out-of-state schools.) Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938) (invalidating state law that excluded blacks from state law school, despite state subsidy for out-of-state legal education for

Yet, even after this Court's explicit rejection of the "separate but equal" doctrine, many law schools persisted in refusing to consider black applicants.[11] It was not until 1964 that the Association of American Law School's Committee on Racial Discrimination could state that no member school reported a policy of denying admission on the grounds of race or color. AALS Proceedings, 1964, Part One: Reports of Committees 159. See also Civil Rights, Report of United States Commission on Civil Rights

---

10/ continued

blacks. The response to these cases by Missouri and by a number of other states was to set up separate in-state law schools for blacks. These schools were generally recognized as inferior and further suits were necessary to force states to abandon their formal policies of discrimination. Sipnel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, C.I., 333 U.S. 147 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). See also LeFlar, Legal Education: Desegregation in Law Schools, 43 A.B.A.J. 145 (1957) (citing additional cases).

11/ W. Leonard, supra note 7, at 145-47.

118 (1963) (most law schools have either totally excluded Blacks or admitted only token numbers). Even more significant is the fact that progress was not actually made toward raising the black enrollment in American law schools until 1968. G. Segal, supra note 2, at 5-7.

Black lawyers were also flatly denied admission to most national, state, and local bar associations through the first half of the twentieth century. This racial exclusion denied minority lawyers professional contact with the main body of the bar, advanced the racial stratification of an already white-dominated occupation, and forced blacks to organize separate professional associations.[12/]

12/ In response to the discrimination of traditionally white professional associations, black lawyers organized the National Bar Association in 1925, as well as local bar assocations in nearly every major city. Ortique, The National Bar Assocation -- Not Just an Option, 53 Judicature 390 (1970).

The American Bar Association was publicly confronted with the issue of race for the first time in 1912 when the ABA executive committee unknowingly admitted three black lawyers to membership in the Association. Informed of its oversight, the executive committee immediately rescinded the admissions, stating that "the settled practice of the Association has been to elect only white men to membership." G. Segal, supra note 2, at 17; J. Auerbach, Unequal Justice 65 (1976). Although the executive committee's recission was rejected on procedural grounds, and the memberships affirmed, by a resolution at the ABA's 1912 annual meeting, this resolution made clear that the election "was by inadvertance" and that "it has never been contemplated that colored men were to be members of the Association." 37 A.B.A. Reports, 1912, 13, 93, 95. The resolution also directed that henceforth those recommending a black lawyer for membership should "accompany the recom-

mendation with a statement of the fact that he is of such a race." Id. at 13.[13/]

It was not until 1943 that this openly racist policy was dropped and the ABA began to consider black applicants for membership. G. Segal, supra note 2, at 19. An entire decade passed before black lawyers were accepted as active participants in the Association. Id. See also Ortique, supra note 12, at 392.

Similar policies excluded black lawyers from bar associations at the local level. For instance, the Bar Assocation of the District of Columbia maintained an official policy of segregation until 1958. Blacks Moving into Key Legal Posts, Washington Post, April 11, 9176, at A-1, 19. Despite the fact that Washington D.C. was the center of legal education for blacks, black lawyers

---

13/ The motivation behind this disclosure requirement was made plain by the Assocation's membership chairman who baldly stated that the admission of blacks posed "a question of keeping pure the Anglo-Saxon race." J. Auerbach, supra p. 16, at 66.

were barred from the library in the federal courthouse in that city until a lawsuit was instituted. U.S. ex rel. Robinson v. Bar Assocation of the District of Columbia, 197 F.2d 408 (D.C. Cir. 1952). In the same tradition, Black students were not permitted to attend review courses offered prior to bar examinations. G. Segal, supra, note 2 at 196. In like manner, blacks were expressly excluded from the Chicago Bar Association until well after World War II. M. Goldman, A Portrait of the Black Attorney in Chicago 35-36 (1972). (This policy reflected the "direct hostility" and racial prejudice of many of the organization's most influential members, who were also among the city's most prominent corporate attorneys."). The evolution of separate black bar assocations across the country -- Harlem Lawyers Association, Blackstone Law Club, Houston Lawyers Association, Louis A. Martinet Legal Society, and many others -- attests to widespread discrimination by

professional associations. While the proclaimed ethics of these local assocations supported the ideal of equal justice for all, their actions manifested deep-seated hositility to blacks. Quite simply, racism was elevated above professionalism. See J. Auerbach, supra p. 16 at 66. It is not surprising that as late as 1963 the United States Commission on Civil Rights reported that black lawyers were "severely limited" in their opportunities for bar assocation participation.[14/]

With the proliferation of corporate and commercial law firms in the twentieth century and the growing domination by these firms of the most lucrative areas of prac-

---

14/ Civil Rights, U.S. Commission on Civil Rights 119 (1963):

> The opportunities for professional contacts and continuing legal education that attend bar assocation membership appear to be severely limited for Negro lawyers ... Even where Negroes are admitted to membership, they are usually excluded or discouraged from participation in social and education programs sponsored by the associations.

tice, especially within associations located in metropolitan areas, the discriminatory employment practices of these firms came to play an increasingly central role in the racial stratification of the bar. Prior to the enactment of Title VII, overt racial discrimination by law firms confined most black lawyers to the least desirable areas of practice at the "fringe of the profession" -- criminal, domestic relations and small claims. Gellhorn, supra note 3, at 1070; M. Goldman, supra note 4, at 6.

By 1960 there were still barely 2000 black lawyers, comprising slightly more than 1% of the legal profession.[15/] Denied "the social, economic and political rewards of the white legal profession," W. Leonard, Black Lawyers, 214 (1977), the majority of these black lawyers operated in what G. Franklin Edwards in his 1959 study of the

---

15/ U.S. Bureau of the Census, 1960 Census, Vol. 1, Pt. 1, Table 205, pp. 1-544; Statistical Abstract of the United States, 1969 at 24.

opportunities available to black lawyers labeled a "starvation profession." G.F. Franklin, The Negro Professional Class 135 (1959).

That this professional stratification and racial segregation is attributable in large part to discriminatory employment practices on the part of white law firms has been widely recognized. See, e.g., Shuman, A Black Lawyer Study, 16 How. L.J. 225, 20 (1971) ("the most prominent factor obstructing Blacks from successful private practice is discrimination by large established White firms."); M. Goldman, supra note 4, at 6 (American Bar Foundation study concludes that "[t]he persistence of formal and informal policies of segregation within most white law firms and local corporations has ... placed major limits on opportunities for black attorneys."); Baker, supra note 3, at 691 (black lawyers "were virtually excluded from large and medium size law firms until the mid-sixties", resulting in "second-class

the mid-sixties", resulting in "second-class status"), E. Smigel, The Wall Street Lawyer, 45 (1964) (study finds only three black lawyers employed by large New York firms.)

Moreover, the refusal to hire minorities cannot be attributed to the low number of blacks graduating from prestigious law schools prior to 1964. Amicus is familiar with numerous black lawyers who graduated with impressive academic records from highly respected law schools and were flatly rejected by corporate firms.[16/]

16/ One blatant example, which has drawn public attention, is William T. Coleman, Jr. Despite the fact that Mr. Coleman graduated magna cum laude from Harvard Law School and was an editor of the Harvard Law Review, he was unable to find employment with any major Philadelphia law firm in 1946. G. Segal, supra note 2, at 32, 77-78, 218-219. Coleman went on to clerk for Judge Goodrich of the U.S. Court of Appeals for the Third Circuit (1947-48), and then for Justice Frankfurter as the first black law clerk to this Court. Id. Even with this background, Coleman was turned down by a number of New York law firms before finally finding employment with a firm in that city. Clark and Clark, The Black Lawyer -- A New Day, But Slow in Dawning, in Minority Opportunities in Law for Blacks, Puerto Ricans and

In a survey of 120 Northern law firms conducted by the Harvard Law Record in 1963, many firms openly admitted that race was a central criterion used in hiring. The Firms -- What Do They Want, Harvard Law Record, Vol. 37, no. 9, 1, 8-9 (Dec. 12, 1963). The firms were asked to rate different qualities on a scale between +10 and -10, with +10 representing a characteristic that in and of itself would assure an applicant of a job offer, and -10 designating a characteristic that would lead to an automatic rejection. On an average, the firms gave a -3.5 rating to the "Negro" trait, confirming the overt nature of law firm discrimination against blacks. Id. at 8-9 A number of firms emphatically commented that, when hiring

---

16/ continued

Chicanos 256 (1974). Similiarly, Judge A Leon Higginbotham, Jr., a 1952 graduate of Yale Law School was repeatedly denied employment with Philadelphia labor law firms. Id. at 256-257; see also, W. Leonard, supra note 9, at 32.

associates, they looked for "an intelligent white male." Id. at 8.

Secretary of Labor W. William Wirtz acknowledged the overt discrimination within law firms at the time of the enactment of Title VII. In a speech before the Association of American Law Schools in December, 1963, he declared that "the legal profession has got a lot to answer for" with respect to the "racial barriers" that exclude blacks from the practice of law. A.A.L.S. Proceedings, 1963, Part Two 100 (reporting that a Department of Labor Study found only thirty-five firms in the entire country which employed a black lawyer.) Wirtz emphasized that an elimination of existing intentional discrimination within law firms was an essential prerequisite to any integration of the profession. He told his audience of educators that their efforts to increase the number of black law students would be doomed to failure until law firms were willing to offer blacks an equal op-

portunity incentive to pursue a career in law. Id.[17/]

The United States Commission on Civil Rights also gave special attention to the plight of black lawyers in its 1963 Report. Civil Rights, Report of United States Commission on Civil Rights (1963). The Commission noted that blacks in many states "have faced difficulty in gaining admission to law schools, impediments to admission to the bar, and severe limitations on their professional association and contacts." Id at 118.

An American Bar Foundation study concluded that "the latent racism which has accumulated in all major American social

17/ See also Carl and Callahan, Negroes and the Law, 17 J. of Legal Ed. 250, 254 (1964-65) (Motivation [to go to law school] implies a strong desire to learn with the hope or knowledge that one's effort and determination will be satisfied by rewards of a profession: social status, respect, the opportunity to render service, as well as the acqusition of some of the comforts and pleasures of life..."); G. Myrdal, supra note 7, at 325-26, 550, 801-02; C. Silberman, Crisis in Black and White (1964).

institutions also pervades the legal profession." M. Goldman, supra note 4 at 49. The overt discrimination that was openly displayed by law firms prior to the enactment of Title VII played a major role in denying black lawyers access to important areas of practice and perpetuating a racially stratified profession.

B. Congress Chose Not to Create An Exemption to Protect the Discriminatory Practices of Law Partnerships

As the Court has repeatedly recognized, "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 [1973], "International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In achieving this objective, Title VII was intended to "eliminate discrimina-

tory effects of the past as well as bar discrimination in the future." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Louisiana v. United States, 380 U.S. 145 (1965)).

The Court of Appeals below, after admitting that "[n]either the statutory language nor the legislative history of Title VII greatly illuminate its decision in this case, 678 F.2d, at 1027, presumed that Congress intended to exempt partnership decision from Title VII scrutiny.[18/]

This presumption regarding congressional intent is directly contrary to the overall objectives of the Act. In the light of the recognized discriminatory history of the legal profession prior to 1964, ante at

---

18/ The majority opinion for the divided Court of Appeals refused to recognize Title VII jurisdiction in the absence of a showing of "the requisiste congressional intent to permit Title VII's intervention." 678 F.2d, at 1026. Thus, it is clear that the majority opinion approached this case with an implicit presumption, albeit rebutable, that Title VII was not intended to reach partnership decisions.

6-26, an exemption of partnership decisions would have frustrated the central statutory purposes of eliminating racial discrimination from the workplace and eradicating its past effects.

Indeed, the discriminatory policies that Congress undoubtedly observed within law firms in 1964 reflected precisely the kind of discrimination that Title VII was most directly designed to address. Intentional discrimination, such as that openly demonstrated by law firms prior to 1964, ante at 21-26, was "the most obvious evil Congress had in mind when it enacted Title VII. International Brotherhood of Teamsters v. United States, 431 U.S., at 335 n. 15. Moreover, by excluding blacks from the most lucrative areas of legal practice, law firms perpetuated the long-standing racial stratification of the bar and "operated[d] to 'freeze' the status quo of prior discriminatory practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), ante at 6-26.

In the absence of a "clear congressional mandate" to the contrary, Title VII should be read to be "broadly inclusive," County of Washington v. Gunther, 452 U.S. 161, 170, 178 (1981); it should not be assumed that Congress knowingly intended to sanction intentional discrimination that would undermine the effectiveness of the Act.

That Congress did not intend to exempt partnership decisions from Title VII scrutiny is strongly supported by the fact that where Congress did wish to exclude a relationship from regulation under the Civil Rights Act of 1964, it did so by express statutory provision. See Andrus v. Glover Construction Co., 466 U.S. 608, 616-17 (1980) ("[w]here Congress explicity enumerates certain exemptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.). Title VII excludes certain employment decisions in order to

protect certain associational interests similar to those asserted by Respondent in this case,[19] as well as protecting a number of similiar concerns.[20] Both Title II of the Civil Rights Act of 1964[21] and Title VIII[22] also include statutory

---

19/ See 42 U.S.C. §2000e(b)(2) (exempting bona fide private membership clubs); 42 U.S.C. §2000e(b) (excluding employers with fewer than minimum number of employees -- this requirement was adopted at least in part to protect associational concerns of small employers. See Cong. Rec. 13088 (1964) (Statements of Senator Humphrey)).

20/ See 42 U.S.C. §2000e-1 and 42 U.S.C. §2000-2(e)(2)(exempting religious groups and religious educational institutions respectively); see also 42 U.S.C. §2000-2(i) (permitting preferential treatment in hiring of American Indians by employers on or near Indian reservations); cf. 42 U.S.C. §2000e-2(h) (protecting seniority rights established prior to time of enactment).

21/ See 42 U.S.C. §2000a(e) (exempting private clubs from Public Accomodations Act); 42 U.S.C. §2000a(b)(1) (exempting establishment with no more than five rooms to rent where proprietor is an occupant).

22/ See 42 U.S.C. §3603(b)(2) (exclusion for residential units occupied by no more than four families where owner maintains residence within); 42 U.S.C. §3607 (exemption for private membership organization renting rooms to own members).

exemptions designed to protect associational interests.

II. RACIAL DISCRIMINATION WITHIN LAW PARTNERSHIPS REMAINS A SIGNIFICANT BARRIER TO EQUAL EMPLOYMENT OPPORTUNITY

A. The Racially Premised Decision Making That Persists In Most Law Partnerships Is Precisely the Type of Barrier Title VII Was Intended to Eliminate

For the purpose of this appeal, it must be assumed that Petitioner can demonstrate that overt and deliberate discrimination motivated Respondent's decision to deny Petitioner partnership and to terminate her employment.[23/] Thus, if the decisions

---

23/ In dismissing Petitioner's complaint on its face under F.R. Civ. P. 12(b)(1), the District Court was obligated to accept Petitioner's claims of sex discrimination as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint alleged, inter alia, that Respondent knowingly applied different standards to males than to females in making partnership promotions. Complaint ¶17. Indeed, the trial judge expressly stated that his decision to dismiss assumed that even if "naked discrimination was the sole and producing cause of plaintiff's rejection as a partner," the court lacked jurisdiction under Title VII to proceed. 25 Empl. Prac. Dec. (CCH) ¶31, 703 at 20,064 (N.D. Ga. 1980).

below are affirmed, Title VII will present no obstacle to a partnership that wishes to maintain an outright policy of refusing to consider any minority for partnership promotion. By adopting a partnership structure law firms will be able to return to the type of discrimination that flourished prior to 1964. See ante at 6-26.

It is generally recognized that "more subtle" and "indirect forms of racism" exist in most law firms today. M. Goldman, supra, note 4, at 3. Two such barriers, based on invidious racial sterotypes reflecting the perceived prejudices of clients and co-workers, are widespread and operate to deny black lawyers access to partnership positions. Both reflect a form of insitutionalized racism that Title VII was intended to eliminate from the workplace.

The most frequently offered "behind-the-scenes" explanation for the continued exclusion of blacks from law partnerships is that firms fear that clients would prefer

not to have frequent contact with, or depend upon, black attorneys. National Law Journal, April 20, 1981, at 10 (quoting Robert Kutak of Kutak, Rock & Huie, the only major firm with more than two black partners); M. Goldman, supra note 4, at 6, Shuman, supra p. 21, at 260; see also E. Smigel, The Wall Street Lawyer 66 (1964); The Harvard Law Record, supra p. 23, at 13.

That Title VII proscribes employment discrimination stemming from the perceived racial prejudices of clients or customers has been so clear that this principle has seldom merited explicit discussion in the context of a race discrimination case. In the area of sex discrimination, where employers have occasionally attempted to openly justify employment practices on the basis of customer preferences, it has been declared "totally anomalous ... to allow the preferences and prejudices of customers to determine whether ... discrimination was valid." Diaz v. Pan American World Airways,

442 F.2d 385, 389 (5th Cir.), cert denied 404 U.S. 950 (1971)(leading case); see also 29 C.F.R. §1604.2(a)(1)(iii)(except in very limited and specific situations, bfoq may not be granted "because of preferences of coworkers, the employers, clients or customers"). Since Diaz, supra, it has been axiomatic that employers may not discriminate on the basis of client's preferences and the elimination of employment practices that cater to such prejudices has been a primary target of Title VII.

A second excuse offered for the exclusion of blacks from partnership ranks is the fear that a minority lawyer will not "fit in" socially with an otherwise all white partnership. See Shuman, supra, p. 21, at 235, 260; Edwards, A New Role for the Black Law Graduate -- A Reality or an Illusion? 69 Mich. L. Rev. 1407, 1411 (1971); see also Smigel, supra p. 33, at 66. This purported justification is no more than a remnant of the racial animus and openly-enforced

segregation that existed prior to 1964. It reflects the continued prejudicial inability of many whites in upper level positions to view blacks as equals.24/

Title VII was intended to eliminate decision-making based on such "'stereotyped' characterizations," Dothard v. Rawlinson, 433 U.S. 321 333 (1977), "[i]t provides that men and women shall be employed on the basis of their qualifications, ... not as colored citizens, but as citizens of the United

---

24/ The principle that discriminatory employment practices cannot be justified by co-workers' racial prejudice is also so well accepted that it is seldom explicitly raised. Title VII has, however, been frequently used to invalidate employment policies that reflect and reinforce social prejudice among employees. See, e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971)(employer and union ordered to institute nonracial rules regarding use of toilet, locker and shower facilities; segregated facilities seen as "a vestige of pervasive discrimination"); Dickerson v. U.S. Steel Corp., 15 Fair Empl. Prac. 752, 772 (E.D.Pa. 1977) ("[t]he decision of an interviewer not to send blacks to a certain department in order to avoid complaints on harrassment is as much a racially based decision as is a foreman's decision to reject blacks because he does not want to work with them").

States." 110 Cong. Rec. 13088 (1964)(statement of Senator Humphrey) quoted in International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15. A decision to reject a black partnership candidate and to terminate her employment, based solely on a suspicion that a minority lawyer would not "fit in", is racially premised and violates the fundamental mandate of the Civil Rights Act of 1964 not to treat individuals as simply components of a racial class." City of Los Angeles Department of Water v. Manhart, 435 U.S. 702, 708 (1978); see also Connecticut v. Teal, ___ U.S. ___, 50 U.S.L.W. 4716 (June 4, 1982).

Law partnerships should not be given special privlieges to engage in racial discrimination based on a fear of client or collegue discomfort. Nor should the federal courts abdicate their responsibility to eliminate these forms of racial discrimination simply because partnership decisions necessarily entail subjective judgements.

The trial court's decision below relied heavily on the misperception that recognition of Title VII jurisdiction would undermine law firms' freedom to select partners based on a subjective evaluation of a wide range of "needed, worthy and desirable qualities." 25 Empl. Prac. Dec. 31, 703 at ¶20, 062 (analogizing partnership promotions to marriage). Title VII has been applied to a wide range of subjective decision-making processes, including those involving employment of lawyers and other professionals. See, e.g., Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dismissed 496 F.2d 1094 (2d Cir. 1974)(hiring of law firm associates); Anderson v. City of Albequerque, 690 F.2d 796, 802 (10th Cir. 1982)(female attorney alleges unlawful discrimination in hiring for position of director of city's Human Rights Board, "subjective evaluations" at issue); see also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947,

973-978 (1982). In cases involving this type of subjective system, the courts have warned that subjectivity may serve to mask discrimination, and therefore the courts must exercise special scrutiny. Davis v. Califano, 613 F.2d 957 D.C. Cir. 1979). Title VII jurisdiction has been exercised to fulfill the statutory mandate to ensure that such decisons are not tainted by unlawful discrimination, while not necessarily disturbing the subjective process. Id.

Thus, the trial court's apparent misapprehension that Title VII would restrict a firm's consideration of a prospective partner's "ability and industry, ... moral character, fidelity, trustworthiness, loyalty, personality and love," 25 Empl. Prac. Dec. 31, 703 at ¶20, 062, is totally unfounded. Law firms would continue to be free to evaluate these qualities and to reject candidates, minority or otherwise, who fell short of the firm's standards. The application of Title VII would merely pro-

hibit the addition -- either overtly or covertly -- of "white," "male," "protestant," or any other discriminatory criteria to the list of characteristics required for partnership.25/

The reluctance of the courts below to become involved in reviewing this type of subjective selection system and the court's confusion regarding the effect of Title VII on such systems are not unprecedented. In the years immediately following the 1972

25/ While this task will undoubtedly involve the courts in "sensitive and difficult" factual inquiries, U.S. Postal Service v. Aikens, 51 U.S.L.W. 4354, 4356 (April 5, 1983), regarding the state of mind of persons who make partnership decisions, the Court has recently affirmed that this difficulty does not justify a departure from the general judicial function of attempting to determine such ultimate questions of fact.

In addition, it should be noted that under well-established Title VII doctrine, plaintiffs should be permitted to challenge facially neutral standards used in the partnership promotion process. Such standards, would however, be unlawful only where they were unrelated to the wide range of qualities that can be legitimately desired

amendments that extended Title VII to cover academic institutions, several courts openly expressed their hesitance to review faculty appointments at the university level. See, e.g., Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974) (plaintiff's Title VII claim "would remove any subjective judgments by her faculty collegues in the decision-making process"). This "hands off" approach has since been soundly rejected and recognized as a "judicial abdication of a responsibility entrusted to the courts by Congress." Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 176 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978)(remand expressly sanctioning application of traditional Title VII standards to universities); Powell v. Syracuse University, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978) (retracting Faro, supra.[26/] Similarly,

---

26/ See also Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir.

this Court should reject the "hands off" approach articulated by the opinions below and encourage the courts to undertake their statutory responsibility to eradicate racially premised practices in law firms.

B. As A Result of Continued Racial Discrimination, Blacks Remain Dramatically Underrepresented in the Legal Profession and in Law Partnerships.

The vestiges of the legal profession's racist history and the effects of ongoing racial discrimination are apparent in the continued underrepresentation of blacks in the profession. Although minorities have made substantial gains during the past decade in their particpation rate within the profession, the practice of law remains one of the most segregated of all occupations.

That the legal profession has remained

26/ continued
1980); Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3d Cir. 1980); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979).

one of the most racially exclusionary and segregated occupational groups in this country is an inescapable fact. In 1972, for instance, of the seventy-nine occupations for which statistics are available, the category of "lawyers and judges" ranked seventy-ninth as employing the fewest black men -- as a percent of all men in the profession -- of any occupation.[27/]. Further, while the ratio of the total population to all lawyers in 1980 was 420 to 1, the ratio for blacks was 2000 to 1. B. Curran, Career Patterns of Minority Lawyers 3, (paper presented at a program on "The Need for Recruitment of Minority Lawyers" at the ABA midyear meetings, Feb. 5, 1983 (prepared by the American Bar Foundation)).

Still another major impediment is the fact that black lawyers continue to be denied access to the most lucrative areas of

27/ Westcott, Blacks in the 1970's: Did they scale the job ladder, 105 Bureau of Labor Statistics Monthly Labor Review 32 (June 1982).

practice. According to a 1979 estimate by J. Clay Smith, Jr., then Acting Chariman of the Equal Employment Opportunity Commission, only 13.6% of black lawyers were employed in private practice.[28/] This figure stands in sharp contrast to the 70% of the total lawyer population in private practice.[29/] The majority of black lawyers are forced to accept employment in less desirable positions with governmental agencies and corporations. G. Segal, supra note 2, at 216. Smith attributed the disproportionately small number of black lawyers in private practice at least in part, to the failure of established white firms to hire blacks in

---

28/ See G. Segal, supra note 2, at 215-16 (citing J. Clay Smith, Jr., "The Future of the Black Lawyer in America," speech before the Annual Convention of the Old Dominion Bar Association, May 26, 1979, p. 2). The remainder of black lawyers is divided as follows: public interest law firms (4.5%); corporations (20.9%); federal or state government lawyers (31.8%); federal or state judges (3.6%); law teachers (2.7%); nonlegal jobs or unemployed (22.7%).

29/ B. Curran, Lawyer Demographics 4, paper presented at ABA Annual Meeting, Aug. 8, 1981.

substantial numbers. Id.

In 1971, Judge Harry T. Edwards, then a professor at the University of Michigan Law School, conducted a study of seventy-one law firms in seven midwestern states. A New Role for the Black Graduate -- A Reality or an Illusion? 69 Mich. L. Rev. 1407 (1971). The study revealed that while blacks comprised 8.1% of the population and 2.0% of the lawyers in the relevant states, they accounted for fewer than 0.6% of the total number of lawyers working at the responding firms (13 of 2,225), and only 0.8% of the partners (1 of 1,249). Id. at pp. 1434, 1438. Judge Edwards concluded that the major barrier to providing black lawyers with opportunities for "quality" practices was the "lack of interest on the part of firms to employ beyond a 'token' minimum of Blacks." Id. at 1428.[30] See also M.

30/ Edwards, "Headwinds" Minority Placement in the Legal Profession, 16 L. Quadrangle Notes 15, 17 (U. of Mich. L.S., Spring (1972)).

Goldman, supra note 4, at 6-7 (American Bar Foundation study reports that although a few Chicago firms in 1972 were willing to consider "a few highly qualified blacks" to work as "research attorneys" or in "low-status areas of the law," black law graduates were still severely limited by the "persistence of formal and informal policies of segregation within most white law firms.")

Current studies confirm that although minorities have made progress in the past decade in attaining associate positions with firms, very few black lawyers have been promoted to the rank of partner. Thus, the progress that has been made will not have lasting effect unless the growing number of black associates is guaranteed an opportunity to continue their careers free from racially motivated employment decisions.

A study recently published by Geraldine Segal reports the 1980 racial composition of 325 law firms in sixteen cities. G. Segal,

Blacks in the Law (1983). This study includes data from 218 "medium size" firms, each employing twenty-five to ninety lawyers, and 107 large firms, each with more than ninety attorneys. These firms accounted for over 28,000 lawyers. From this extensive study, Ms. Segal concludes "that blacks in this country have not acquired their fair share of the opportunities and rewards potentially available from the pursuit of law." Id. at 243.

A tabulation of the data gathered by Segal's study is contained in the attached Appendix. A brief summary of the figures for several cities suffices to demonstrate that blacks continue to be severely underrepresented in the legal progression, and that black lawyers in many metropolitan bars are grossly underrepresented in law partnerships.

	Atlanta	Chicago	San Francisco
% Blacks In City	65.7	34.7	11.3
% Black Lawyers In SMSA	5.02	3.25	3.43
% Black Lawyers In Firms	1.8	1.1	1.1
% Black Partners In Firms	.02	.02	.01

A 1982 survey of 151 of the nation's largest 200 law firms confirmed Segal's finding regarding the unwillingness of most law firms to promote minorities to partnership positions. National Law Journal, Dec. 20, 1982, at 1, 8, 10. Despite a significant increase in the number of minority associates hired by these firms over the past decade, less than 30% of the firms surveyed employed a black partner. Id. Blacks accounted for only 54 of the total 9,210 partners (0.59%) of the 151

An even more recent pronouncement on the failure of law firms to provide minorities with equal employment opportunities came at this year's American Bar Association midyear meeting. In a program co-sponsored by the ABA Section on Legal Education and the National Association for Law Placement (NALP), officials form both of these organizations along with law students and law firm hiring partners expressed deep concern over the continued practice of many law firms to discriminate on the basis of race. See Minority Attorneys Struggle to Land that First Job, Legal Times, Feb. 7, 1983, at 32, 31. The results of a NALP presented at this program were plain: "minorities remained dramatically underrepresented in private law firms." Id. at 32.

C. A Failure to Permit Title VII Scrutiny of Partnership Promotion Decisions Will Have Far-Reaching Effects and Inhibit Integration of the Entire Legal Profession.

This case involves a narrowly drawn

question of law related solely to Title VII of the Civil Rights Act of 1964 and its coverage. No issues are raised related to the "separate, distinct, and independent remedies provided under 42 U.S.C. §1981 or similar statutes. Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); see B. Schlei and P. Grossman, Employment Discrimination Law, 635-39 (1976).[31/] Nevertheless, amicus believes that the resolution of the issue presented here is of tremendous importance to racial minorities and to the future of the legal profession.

Today, the partnership promotion promotion process within law firms is the most firmly entrenched racial barrier in a long history of barriers that have denied blacks equal access to the legal profession. The

---

31/ Additionally, because the courts below dismissed the Petitioner's complaint prior to the introduction of evidence, this case does not present many of the more subtle substantive issues that might properly present themselves in later actions if the judgement here is reversed.

sanctioning of such a discriminatory barrier by this Court would be perceived by minorities as a clear message that black lawyers, as a group, will remain exiled at the "fringe of the profession." Gellhorn, supra note 3, at 1070. A closing off of the "top of the ladder" would create "frustration, dissatisfaction, and disillusionment," Edwards, supra p. 34, at 1431, and have both direct and indirect effects on the employment opportunities available to minorities.

In 1980 there were over 1100 law firms that employed twenty or more lawyers, and this number was expected to increase. B. Curran, Lawyers Demographics, supra note 29, at 11. Most of these firms are located in metropolitan areas, where the majority of minority lawyers seek employment. Id. at 10 (48% of the private practitioners in the District of Columbia are employed in firms of ten or more lawyers). Thus, in the most direct and limited sense, if the judgement in this case becomes the law of the land,

tens of thousands of jobs in the legal profession will be cordoned off as an area of authorized discrimination. Added to this could be hundreds of thousands of partnership positions in other professions that are, or could be, organized as partnerships.

Moreover, the failure to provide some legal assurance that a black associate will not be denied partnership and discharged for racially motivated reasons will undoubtedly limit the number of blacks willing to accept positions with firms. Despite the trial court's chimerical prognosis that a qualified associate who is denied partnership remains "just as much a promising young lawyer" who "will simply have to seek stardom elsewhere," 25 Empl. Prac. Dec. 31,703 at 20,064, it is unlikely that many blacks will wish to spend a significant portion of their careers working for firms, and for a firm's clients, at the risk of being moved "up and out" by racially motivated and premised decisions. Partner-

ship positions, with their security, responsibility and renumeration remain the "strongest reward" attracting and motivating law firm associates. E. Smigel, supra p. 33, at 259; see also Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Amer. Bar Fnd. Research J. 97. If these positions can be distributed according to racial prejudice or sterotyped characterizations, the desire of black lawyers to spend five or more years as an associate will be greatly diminished.

Finally, because of the position of law firm partners at the perceived apex of the stratified legal profession, see Goldman note 9, at 3-5, the message conveyed by an affirmance of the judgement below would dissuade many blacks from entering the profession at all. See Brown, Racial Discrimination in the Legal Profession, 53 Judicature 385, 386 (1970)("[l]aw firms must also realize that their disinterest in hiring black lawyers discourages potential

black college graduates from ever enrolling in law school"), see also G. Myrdal, supra note 1, at 550 (discriminatory treatment results in socialized perception, within minority group, that minorities are incompetent and unable to function in lawyer's role).

The necessity of keeping upper level positions open finds support in the legislative history of Title VII. In 1972, Congress specifically considered and rejected a proposal to exempt physicians and surgeons from Title VII coverage. Speaking in opposition to the exemption, Senator Javits said:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; ... they cannot ascend the higher rungs in professional and other life.
>
> Yet, this amendment would ... reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion ... [for] one of the rungs of the ladder ... and thus lock in and fortify the idea that being a doctor or a surgeon is just too good

> for members of a minority. 18 Cong. Rec. 3802 (1972).

The desire to open upper level positions to encourage minority advancement at all levels was also a motivation behind the 1972 extension of Title VII to cover academic institutions,[32] and government employment.[33] Bartholet, supra p. 37, at 980-83.

This Court has repeatedly observed that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality of employment opportunity due to discrimination on the basis of race, religion, sex, or national origin [citations omitted], and that its policy of outlawing

---

32/ See, e.g., S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971) (minorities must be ensured equal opportunity to "the higher-paying and more prestigious positions in the institutions of higher learning").

33/ Id. at 14 (criticizing "inordinate concentrations of minorities and women in the lower [civil service] grade levels, and their conspicuous absence from the higher grades") See, e.g., H. Rep. No. 238, 92d Cong., 1st Sess. 23-24 (1971).

such discrimination should have the 'highest priority.'" Franks v. Bowman Transport Co., 424 U.S. 747, 763 (1976)(citations omitted).

CONCLUSION

The courts below failed to appreciate the substantial effect that the judgement here would have on employment practices throughout the bar. To accomplish the purposes of Title VII, this Court should reverse the judgement of the Eleventh Circuit.

Respectfully submitted,

Jack Greenberg
Charles S. Ralston
Gail J. Wright
Suite 2030
10 Columbus Circle
New York, NY 10019
[212]586-8397

Elizabeth Bartholet
Harvard Law School
Cambridge, Massachusetts
[617]495-3128

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

Dated: May 9, 1983

APPENDIX

APPENDIX

City/Type of Firm	Law Firms[1] Total Lawyers	Black Lawyers	Total Partners	Black Partners	Total Associates	Black Associates	City % Black Lawyers in SMSA[2]	% Blacks in City Population[3]
Atlanta							5.02%	65.7%
Large Firms	432	4(0.9%)	212	1(0%)	220	4(1.8%)		
Medium Firms	620	15(2.4%)	278	1(0.4%)	342	14(4.1%)		
All Firms	1052	19(1.8%)	490	1(0.2%)	562	18(3.2%)		
Boston							2.07%	21.1%
Large Firms	368	4(1.1%)	182	1(0.5%)	186	3(1.6%)		
Medium Firms	1015	9(0.9%)	524	1(0.2%)	491	8(1.6%)		
All Firms	1383	13(0.9%)	706	2(0.3%)	677	11(1.6%)		
Chicago							3.25%	34.7%
Large Firms	1691	22(1.3%)	812	2(0.2%)	879	20(2.2%)		
Medium Firms	2050	19(0.9%)	1000	1(0.1%)	1050	18(1.7%)		
All Firms	3741	41(1.1%)	1812	3(0.2%)	1929	38(2.0%)		
Cleveland							4.97%	42.5%
Large Firms	536	8(1.5%)	246	2(0.8%)	290	6(2.1%)		
Medium Firms	584	12(2.1%)	268	2(0.7%)	316	10(3.2%)		
All Firms	1120	20(1.8%)	514	4(0.8%)	606	16(2.6%)		
Columbus							3.73%	21.9%
Large Firms	223	5(2.2%)	111	0(0%)	112	5(4.5%)		
Medium Firms	42	1(2.4%)	24	0(0%)	18	1(5.6%)		
All Firms	265	6(2.3%)	135	0(0%)	130	6(4.6%)		
Detroit							5.42%	61.6%
Large Firms	212	8(3.8%)	103	0(0%)	109	8(7.3%)		
Medium Firms	368	10(2.7%)	206	2(1.0%)	162	8(5.0%)		
All Firms	580	18(3.1%)	309	2(0.6%)	271	16(5.9%)		
Houston							3.27%	25.9%
Large Firms	1045	10(1.0%)	424	0(0%)	621	10(1.6%)		
Medium Firms	729	7(1.0%)	301	0(0%)	428	7(1.6%)		
All Firms	1774	17(1.0%)	725	0(0%)	1049	17(1.6%)		
Los Angeles							3.38%	13.4%
Large Firms	716	16(2.0%)	250	2(0.8%)	466	14(3.0%)		
Medium Firms	1444	26(1.8%)	682	5(0.7%)	762	21(2.8%)		
All Firms	2160	42(1.9%)	932	7(0.7%)	1228	35(2.9%)		

1/ G. Segal, supra note 1, at pp. 125, 131, 137, 144, 149, 154, 159, 165, 168, 170, 180, 185, 190, 194, 205 (1983)

2/ Census of Population: Equal Employment Opportunity Special File [machine readable data file]/prepared by Bureau of Census, Washington: The Bureau. 1982.

3/ G. Segal, supra note 1, at 118.

City/Type of Firm	Law Firms[1] Total Lawyers	Black Lawyers	Total Partners	Black Partners	Total Associates	Black Associates	City % Black Lawyers in SMSA[2]	% Blacks in City Populatio
Milwaukee							1.45%	22.9%
Large Firms	277	4(1.4%)	153	1(0.7%)	124	3(2.4%)		
Medium Firms	116	0(0%)	60	0(0%)	56	0(0%)		
All Firms	393	4(1.0%)	213	1(0.5%)	180	3(1.7%)		
Minneapolis							1.04%	7.6%
Large Firms	272	2(0.7%)	145	0(0%)	127	2(1.6%)		
Medium Firms	184	0(0%)	101	0(0%)	83	0(0%)		
All Firms	456	2(0.4%)	246	0(0%)	210	2(0.9%)		
New York							2.59%	21.0%
Large Firms	3831	56(1.5%)	1267	1(0.1%)	2564	55(2.1%)		
Medium Firms	4280	40(0.9%)	1565	3(0.2%)	2715	37(1.4%)		
All Firms	8111	96(1.2%)	2832	4(0.1%)	5279	92(1.7%)		
Pittsburgh							2.63%	24.0%
Large Firms	497	3(0.6%)	236	1(0.4%)	261	2(0.8%)		
Medium Firms	145	0(0%)	62	0(0%)	83	0(0%)		
All Firms	642	3(0.5%)	298	1(0.3%)	344	2(0.6%)		
Philadelphia							3.67%	36.5%
Large Firms	1094	26(2.4%)	531	4(0.8%)	563	22(3.9%)		
Medium Firms	550	6(1.0%)	228	1(0.3%)	262	5(1.9%)		
All Firms	1644	32(1.9%)	759	5(0.7%)	825	27(3.3%)		
Richmond							4.28%	50.7%
Large Firms	276	3(1.1%)	134	0(0%)	142	3(2.1%)		
Medium Firms	177	1(0.6%)	96	0(0%)	81	1(1.2%)		
All Firms	453	4(0.9%)	230	0(0%)	223	4(1.8%)		
San Francisco							3.43%	11.3%
Large Firms	927	14(1.5%)	397	1(0.2%)	520	13(2.5%)		
Medium Firms	727	5(0.6%)	312	0(0%)	415	5(1.2%)		
All Firms	1654	58(2.1%)	709	1(0.1%)	935	18(1.9%)		
Washington, D.C.							6.57%	68.4%
Large Firms	861	22(2.5%)	352	4(1.1%)	509	18(3.5%)		
Medium Firms	1867	36(1.9%)	877	7(0.8%)	990	29(2.9%)		
All Firms	2728	58(2.1%)	1229	11(0.9%)	1499	47(3.1%)		
TOTALS								
Large Firms	13258	207(1.6%)	5555	19(0.3%)	7693	188(2.4%)		
Medium Firms	14898	187(1.3%)	6584	23(0.3%)	8254	164(2.0%)		
All Firms	28156	394(1.4%)	12139	42(0.3%)	15947	352(2.3%)		